Office - Supr... U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS,
CLERK

82-1241

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 83-_____

E. WAYNE PINCKARD, et al,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

EDMUND L. COGBURN
DOW, COGBURN & FRIEDMAN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

Attorneys for Petitioners

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

1. Is an injunctive order, enjoining Petitioners from divulging any information regarding the personal deportment of Respondent, except to certain persons, a violation of the Constitutional Rights of Petitioners under the Fourteenth Amendment to the United States Constitution, as an obvious previous restraint against freedom of speech?

2. Is an injunctive order, which enjoined Petitioners from divulging any information regarding the personal deportment of Respondent, except to certain persons, a violation of Petitioner's Constitutional rights under the Fourteenth Amendment to the United States Constitution where such order has neither pleading nor evidence from the record to support it?

3. Is an injunctive order, which enjoined Petitioners from divulging any information regarding the personal deportment of Respondent, except to certain persons, a violation of Petitioner's Constitutional rights under the Fourteenth Amendment to the United States Constitution where no showing or attempted showing was made regarding a clear and present danger to the administration of justice?

Petitioners submit that each of these questions should be answered in the affirmative.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	6
CONCLUSION	6
CERTIFICATE OF SERVICE	8
EXHIBIT A (Opinion filed March 25, 1982)	A-1
EXHIBIT B (Motion for Rehearing Overruled October 27, 1982)	B-1
EXHIBIT C (Portions of Brief for Petitioner in Texas Supreme Court)	C-1

LIST OF AUTHORITIES

CASES

	Page
Craig v. Harvey, 331 U.S. 367, 91 L.Ed. 1546 (1946)	5
Gulf Oil v. Bernard, 452 U.S. 89, 68 L.Ed. 693 (1981)	5
Near v. Minnesota, 283 U.S. 697 (1931)	5
Vance v. Universal Amusement Co., 445 U.S. 308, 63 L.Ed. 413 (1979)	5

UNITED STATES CONSTITUTION

First Amendment	5, 6
Fourteenth Amendment	5, 6

UNITED STATES STATUTES

28 U.S.C. § 1257(3)	2
28 U.S.C. § 2101(c)	2

TEXAS CIVIL STATUTES

Article 4642	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 83-_____

E. WAYNE PINCKARD, et al,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

The Petitioners herein[1] respectfully pray that a Writ of Certiorari issue to review the opinion and decree of the Supreme Court of Texas, entered in this proceeding by the overruling of Petitioner's Motion for Re-Hearing of the Order of the Supreme Court dismissing Petitioner's Application for Writ of Error (Cause No. C-1293 in the

1. Petitioners herein are E. Wayne Pinckard, PBI Houston, Inc. (formerly Pinckard Brothers Interests, Inc.), W. Howard Smith, The Bradford Group, Inc., Gene Phillips and SYNTEX Corporation. The Respondent is Kenneth R. Pinckard, brother of E. Wayne Pinckard, The underlying controversy deals with control and operation of PBI Houston, Inc., a closely held corporation involved in the development of commercial real estate.

Supreme Court of Texas), for want of jurisdiction, such Motion for Re-Hearing being overruled on the 27th day of October, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas (reviewing the lower courts ruling in this case) not reported, appears as Exhibit "A". The order of October 27, 1982 ("Order"), of the Supreme Court of Texas, unreported, acted to overrule Petitioners' Application for Writ of Error to the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, dismissed by the Texas Supreme Court for want of jurisdiction. Exhibit "B" is a letter from the Clerk of the Texas Supreme Court, notifying Petitioners of entry of the Order. Exhibit "C" is an excerpt from Appellants' Brief filed in the Fourteenth Court of Appeals of Texas, by Petitioners, demonstrating the Constitutional argument raised by Petitioners at their first opportunity, which came after entry of the trial court's order.

JURISDICTION

The Order, overruling Motion for Rehearing, entered by the Supreme Court of Texas was dated October 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), since Petitioners seek Writ of Certiorari based on the right to freedom of speech claimed under the Constitution of the United States. The Order, under 28 U.S.C. 2101(c), from which Petitioners seek review, is, therefore, entered timely for this Petition to be filed.

STATUTORY PROVISIONS INVOLVED

Art. 4642, Texas Civil Statutes (The Texas Injunction Statute):

"Article 4642. 4643, 2989 Grounds for

Judges of the district and county courts shall, in term time or vacation, hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:

1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.

2. Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.

3. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

4. Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law. Acts 1907, p. 206; Acts 1909, p. 354; Const., Art 5, secs. 8, 16."

STATEMENT OF THE CASE

This petition arises from an appeal from the issuance of an (interlocutory) injunctive order in Cause No. 80-52038, signed by the 189th District Court of Harris

County, Texas, on September 16, 1981, which in its turn, modified an original order granting a temporary injunction. The modifying order, while curtailing the rights of the Respondent under the original injunction, contained new matter, which included a specific prohibition upon Petitioners, Defendants therein, from divulging any information regarding the personal deportment of Kenneth R. Pinckard, Respondent, except that such information concerning such personal deportment was permissible to be divulged to the parents of Kenneth R. Pinckard, who were likewise, the parents of E. Wayne Pinckard, one of the Petitioners.

This portion of the Trial Court's order is, baldly, a capricious ruling. Respondent did not seek in his pleading for this relief. There is no evidence of any kind, testimonial or documentary, that suggests that this relief is appropriate to any injury or danger in which Respondent could be. There is no testimony that any of the Petitioners had, in any way disclosed "personal deportment" of Kenneth R. Pinckard to anyone. There is no testimony in the record as to any "personal deportment" of which Respondent would request the Court to prevent revelation.

The order of the trial court uses the terminology of "personal deportment", which is vague, indefinite and uncertain. There is no way to identify the behavioral patterns of Respondent which could properly be classified as "deportment".

Although it is difficult to really determine what the trial court had in mind, the order was probably intended to be a "gag" order similar to those sometimes used in criminal cases to avoid prejudicial publicity ("Fair Trial" vs. "Free Speech"). This is not a criminal case, there was

no showing of any kind that the rights of Respondent to a fair trial were threatened by any sort of divulgence of information as to his "deportment", and, as a result, the rights of Petitioners under the Fourteenth Amendment to the United States Constitution, which incorporates the First Amendment rights of freedom of speech, are seriously abused by this order. *Craig v. Harvey,* 331 U.S. 367, 91 L.Ed. 1546 (1946), Syll. 1; *Gulf Oil v. Bernard,* 452 U.S. 89, 68 L.Ed. 693 (1981) Syll. 7.

This is clearly a prior restraint on protected speech, the type of judicial action which was explicitly proscribed by *Near v. Minnesota,* 283 U.S. 697 (1931); *Vance v. Universal Amusement Co.,* 445 U.S. 308, 63 L.Ed. 413 (1979) Sylls. 1, 3a, 3b, and 4.

Petitioners, therefore, submit to this Honorable Court that this segment of the order is totally unsupportable, whether by constitutional policy, by pleading or by evidence, and especially in view of its fundamental conflict with the United States Constitution. (It conflicts with the Texas Constitution as well.)

The Constitutional issue was raised by Appellants' Brief, filed by Petitioners in Cause No. C-2960, Fourteenth Court of Appeals of Texas (see Exhibit "C" hereto). It has been pursued at each step since then, through Motion for Rehearing in the Fourteenth Court of Appeals, Application for Writ of Error to the Supreme Court of Texas and Motion for Rehearing in the Supreme Court of Texas. Before entry of the trial court's order, no constitutional issue existed, since there was neither pleading nor evidence in the record suggesting a plea for the injunctive relief from which Petitioners appealed.

REASONS FOR GRANTING WRIT

1. The Constitutional protections of the Fourteenth Amendment, incorporating the First Amendment to the United States Constitution, require that Petitioners be permitted their rights of freedom of speech without previous restraint.

2. The Constitutional rights of Petitioners under the Fourteenth Amendment to the United States Constitution, incorporating the First Amendment, with its guarantees of freedom of speech, require at a bare minimum that before freedom of speech is infringed there must be some pleading or evidence submitted to a trial court tribunal as a predicate for granting injunctive relief curtailing such freedom.

3. There was no showing or attempted showing in the trial court that the injunction involved was necessary to protect the impartial administration of justice from a "clear and present danger" thereto.

Petitioners urge this Court to accept this Petition for Writ of Certiorari and correct this improper infringement on the fundamental constitutional rights of Petitioners to freedom of speech.

CONCLUSION

For all the reasons set forth above, a Writ of Certiorari should issue to review the opinion and judgment of the Supreme Court of Texas in refusing jurisdiction of the judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas which, in turn, erroneously affirmed the injunctive order of the trial court in-

fringing the constitutionally guaranteed rights of freedom of speech of Petitioners.

DATED: January 19, 1983.

Respectfully submitted,

DOW, COGBURN & FRIEDMAN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

By: Original Signed By
EDMUND L. COGBURN
EDMUND L. COGBURN
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Edmund L. Cogburn, hereby certify that, on the 19th day of January, 1983, the Petition for Writ of Certiorari to the Supreme Court of the State of Texas was served on Michael T. Powell of Brill, Brooks, Powell & Yount, attorney-of-record for Respondent, at his address at 601 Jefferson, Suite 1060, Houston, Texas 77002, by mailing it to him, by certified United States mail, postage prepaid.

Original Signed By
EDMUND L. COGBURN

EDMUND L. COGBURN

EXHIBIT A

Affirmed, and Opinion filed March 25, 1982.

NO. C-2960

E. WAYNE PINCKARD, et al, Appellant

v.

KENNETH R. PINCKARD, Appellee

Appeal from the 189th District Court
Harris County
Cause No. 80-52038

This is an appeal from an order modifying and continuing a temporary injunction. Sixteen points of error are presented for consideration. We affirm.

The appellant seeks to obtain relief on points one through fourteen and point sixteen "because there is no evidence justifying it, and it was an abuse of discretion to grant it." Point fifteen is also based on abuse of discretion but for the reason that the appellee came to equity with unclean hands.

The key words are "abuse of discretion." The rule concerning the standard of review in an appellate court of an order granting or denying a temporary injunction is well settled. The appellate court is strictly limited to a determination of whether there has been a clear abuse of discretion by the trial court. *Davis v. Huey,* 571 S.W.

2d 859 (Tex. 1978); *State v. Southwestern Bell Telephone Co.*, 526 S.W.2d 526 (Tex. 1975). Upon review of the record there is adequate evidence to support the trial court's order. This being a temporary injunction, there is no need to concern this opinion with the merits.

/s/ JIMMY JAMES
Associate Justice

Affirmed, and Opinion filed March 25, 1982.

Panel consists of Associate Justices Miller, Morse and James.

No Publication—TEX. R. CIV. P. 452.

EXHIBIT B

THE SUPREME COURT OF TEXAS
P. O. BOX 12248 CAPITOL STATION
AUSTIN, TEXAS 78711

October 27, 1982

Mr. Edmund L. Cogburn, Attorney
Nine Greenway Plaza
2300 Coastal Tower
Houston, Texas 77046

Mr. Bruce M. Partain, Attorney
7763 San Felipe - Suite 103
Houston, Texas 77063

Mr. Michael T. Powell, Attorney
601 Jefferson - Suite 1060
Houston, Texas 77002

Dear Sirs:

The motion for rehearing in the case of E. WAYNE PINCKARD ET AL. vs. KENNETH R. PINCKARD, No. C-1293 was this day overruled. Motion to amend granted.

Very truly yours,

/s/ GARSON R. JACKSON
Garson R. Jackson, Clerk

EXHIBIT C

Appellants submit that good faith has been sorely lacking in Ken's behavior at every stage of the transactions involved in this suit. His hands are clearly unclean and he does not deserve relief from a court of equity.

POINTS OF ERROR 5, 12 AND 14 RESTATED

Point No. 5

The Order found that the privacy of Plaintiff has been invaded and a Temporary Injunction was necessary to protect Plaintiff. This finding was in error because there was no evidence to support it.

Point No. 12

The Order enjoins Appellants from conducting surreptitious surveillance of Appellee or friends or relatives of Appellee and from examining or acquiring any document discarded by Appellee. This part of the Order is in error because there is no evidence to justify it, and it was an abuse of discretion to grant it.

Point No. 14

The Order enjoins Appellants from divulging any any information regarding the personal deportment of Appellee, except to Appellee's parents. This part of the Order is in error because there is no evidence justifying it, and it was an abuse of discretion to grant it.

STATEMENT, ARGUMENT AND AUTHORITY UNDER POINTS 5, 12, AND 14

These Points are grouped because they involve the privacy issue as asserted by Ken. There was a finding by the trial court that privacy of Ken had been invaded and he was awarded injunctive relief against "surveillance" and, additionally, Defendants were ordered not to discuss Ken's "personal deportment" except that Wayne was permitted to discuss the matter with Wayne's parents. This part of the Order is an enigma for more than one reason.

THERE IS NO BASIS FOR PRIVACY RELIEF

With respect to the issue of privacy, the only evidence heard by the Court that had any bearing on the issue of privacy was testimony that Wayne employed private investigators to procure information about Ken. There is no evidence that these investigators did anything except check out certain items of information and retrieve various items from the trash discarded by Ken's office. There is no testimony that they "shadowed" him or anyone connected with him. There is no testimony that they committed any kind of a trespass or did anything, in anyway, illegal. Under such circumstances injunctive relief against "surveillance" does not even have a pseudo-basis for support.

In a larger context, it would be hard to support the position that injunction would be proper to dissuade investigation of Ken and his activities. The videotapes reflect a lawless intent to steal the documents of PBI. The actual effect of the investigation was to turn up files of PBI which had been retained by Ken on one pretext

or another and ultimately discarded in Ken's trash. Certainly the fruit of the investigation justified the suspicions that gave rise to it.

THERE IS NO BASIS FOR A "GAG ORDER"

With respect to Ken's "personal deportment" there is no testimony in the record that even touches on that phase of the Order. The Order itself, by using the terminology of "personal deportment" is vague, indefinite, and uncertain. It would be unclear as to what behavioral pattern of Ken would be classified as "deportment".

For example, would the acts of Ken Pinckard in stealing documents from the PBI be "personal deportment" subject to the injunctive ban? Would his appropriation of the "Pinckard" name be "personal deportment"? As a logical absurdity, even the writing of this brief on behalf of Appellants could be well categorized as falling within the injunctive prohibition of the Order.

Possibly the Court regarded this as a "gag" order similar to those sometimes used in criminal cases. In those cases, of course, the Court has the problem of reconciling the First Amendment rights of individuals to speak out and discuss with the Sixth Amendment right to a fair trial. While the resolutions of these issues are still unclear as a matter of constitutional law, it is safe to say that the clash between the First and Sixth Amendment (as incorporated in the Fourteenth Amendment to the United States Constitution), is not present in a civil case where fundamental protections for the criminal accused are not involved.

The Court's Order is, undoubtedly, a prior restraint on protected speech, falling under the ban of *Near v.*

Minnesota, 283 U.S. 697 (1931) as well as Section 8 of the Bill of Rights of the Texas Constitution. It could not be permitted to stand even if supported by pleading and evidence, which it is not. *Dallas General Drivers, Etc. v. Wamix, Inc. of Dallas*, 295 S.W.2d 873 (Tex., 1956) Syll. 9; *Ex Parte Tucker*, 220 S.W. 75 (Tex., 1920); *Dallas Oil & Gas, Inc. v. Mouer*, 533 S.W.2d 70 (Tex. Civ. App.—Dallas, 1976, no writ), Syll. 2; *Amalgamated Meat Cut. v. Carl's Meat & Provision Co.*, 475 S.W.2d 30 (Tex. Civ. App.—Beaumont, 1971, writ dism'd) Sylls. 3, 4 & 5.

Appellants submit, therefore, that the privacy issue was not fully raised either by pleading or by evidence and, regardless, that the relief granted thereon by the Order is inappropriate under any circumstances.

Office-Supreme Court, U.S.
FILED
APR 13 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 82-1241

E. WAYNE PINCKARD, et al,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas Fourteenth Supreme Judicial District

---

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL T. POWELL
BRILL, BROOKS, POWELL & YOUNT
601 Jefferson, Suite 1060
Houston, Texas 77002
(713) 659-8770

Attorneys for Respondent

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

SUBJECT INDEX

	Page
REASONS FOR DENYING THE WRIT	1
1. The judgment sought to be reviewed is not final.	1
2. The state courts did not expressly pass on the federal questions raised by the Petitioners.	2
3. The petition for writ of certiorari is not timely.	3
4. Petitioners have waived any right to challenge the subject portion of the interlocutory injunction.	3
5. The pleadings, evidence and law support the subject order.	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6

LIST OF AUTHORITIES

CASES	Page
American Railway Express Co. v. Levee, 263 U.S. 19	3
Construction Laborers v. Curry, 371 U.S. 542 (1963)	2
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	4
In re: Halkin, 598 F.2d 176 (D.C. Cir. 1979)	6
Johnson v. Zerbst, 304 U.S. 458 (1938)	4
Montgomery Building and Construction Trade's Counsel v. Ledbetter Erection Co., Inc., 344 U.S. 178 (1952)	2
Musser v. Sheppard, 299 U.S. 513	2
Twin City Power Company v. Savannah River Electric Co., 284 U.S. 574	2
Williams v. Quill, 303 U.S. 621	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 82-1241

E. WAYNE PINCKARD, et al,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Kenneth R. Pinckard, respectfully requests that this Court deny the petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

1. The judgment sought to be reviewed is not final.

The Petitioners seek review of one sentence of a five page INTERLOCUTORY injunction signed approximately eighteen months ago. The interlocutory injunction sought to be reviewed by the Petitioners arose from their motion to dissolve a prior temporary injunction. This Court has on numerous occasions held that the denial

of a motion to dissolve a temporary injunction, or the affirmance or reversal of an order granting or denying an interlocutory or temporary injunction is not final when the entire case is not thereby concluded, and is, therefore, not reviewable by this Court. *Montgomery Building and Construction Trade's Counsel v. Ledbetter Erection Co., Inc.,* 344 U.S. 178 (1952); *Musser v. Sheppard,* 299 U.S. 513; *Williams v. Quill,* 303 U.S. 621; *Twin City Power Company v. Savannah River Electric Co.,* 284 U.S. 574. While the Court has occasionally departed from its normal practice of denying interlocutory review, this case does not fit within the criteria apparently justifying such a departure from the normal practice. For instance, in *Construction Laborers v. Curry,* 371 U.S. 542 (1963) the judgment of the Supreme Court of Georgia finally resolved the merits of the issues raised in the course of the hearing on the temporary injunction and left nothing of substance to be decided in the trial court. Postponing review would have seriously eroded the national labor policy requiring the subject matter of the cause to be heard exclusively by the National Labor Relations Board, not by state courts. In the present case, the Texas Supreme Court dismissed the application for writ of error for want of jurisdiction, and no national policy is affected by postponing review in this case until there is a final judgment.

2. The state courts did not expressly pass on the federal questions raised by the Petitioners.

The Texas Supreme Court dismissed the Petitioners' application for writ of error for want of jurisdiction. The intermediate appellate court, the Court of Appeals for the Fourteenth Supreme Judicial District of Texas, in a

three paragraph unpublished opinion affirmed the temporary injunction on non-federal grounds because no abuse of discretion had been shown. (Exhibit "A" to Petition) No opinion was published by the Court of Appeals or the Texas Supreme Court. No precedent has been established in this case, and there is no reason to believe that the issues raised by this case will occur again.

3. The petition for writ of certiorari is not timely.

The time from which the ninety days is calculated is the day of entry of the judgment which the Court is requested to review. The order or judgment of the highest state court is controlling as to the running of the time. By "highest state court" is meant the highest court in which a decision could be had. *American Railway Express Co. v. Levee,* 263 U.S. 19. In the present case, the Petitioners have computed the time for filing their petition from October 27, 1982, the date the Supreme Court of Texas overruled their motion for rehearing. But the Texas Supreme Court denied their application for writ of error for want of jurisdiction. The "highest state court" in which a decision could be had was the Court of Appeals for the Fourteenth Supreme Judicial District of Texas. The Court of Appeals filed its opinion on March 25, 1982, and overruled Petitioners' motion for rehearing on April 22, 1982, substantially more than ninety days prior to the filing of the Petition.

4. Petitioners have waived any right to challenge the subject portion of the interlocutory injunction.

The Petitioners complain about one sentence of a five page order modifying and continuing a temporary in-

junction. This order arose from the Petitioners' application for dissolution of a prior temporary injunction. The prior temporary injunction provided:

> "Defendants (Petitioners) shall not divulge any information or copies relating to Plaintiff (Respondent) except to the parties and the attorneys in this suit or to the Court."

The Petitioners did not appeal from such original temporary injunction provision and their application for dissolution of the original temporary injunction did not seek dissolution of the foregoing quoted portion.

In summary, the original temporary injunction from which no appeal was perfected also contained a provision prohibiting the Petitioners from divulging any information or copies relating to the Respondent. The Petitioners did not appeal from this prohibition and they did not seek to dissolve it in the trial court. They have waived any right to complain about the continuation of such provision in the order modifying and continuing the temporary injunction. See *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Johnson v. Zerbst,* 304 U.S. 458 (1938).

5. The pleadings, evidence and law support the subject order.

After learning that Wayne Pinckard, one of the Petitioners, had employed private investigators to investigate him and his new corporation, Kenneth Pinckard, the Respondent, filed his first supplemental application for temporary injunction seeking to enjoin such conduct as unfair competition, an invasion of privacy and harassment. (Transcript 170). The trial court granted Re-

spondent's application in part and temporarily enjoined both sides of the case from conducting surveillance of any other party, or their friends or relatives; and further temporarily enjoined all parties from examining, appropriating, and acquiring any document or material discarded by any other party. The trial court also temporarily enjoined the Petitioners from divulging any information regarding the personal deportment of the Respondent to anyone except his parents. (Transcript 177, 1978).

Wayne Pinckard, one of the Petitioners testified that he considered himself to be in competition with the Respondent and his corporation, Pinckard Development Corporation (S.F. 313-316). The evidence is also clear that Wayne Pinckard employed private investigators to investigate both his brother, the Respondent, and his brother's corporation, Pinckard Development Corporation (S.F. 44-98, 106-110). Instructions were given to such investigators to search the trash of Pinckard Development Corporation. Such investigators were also told to go to the home of Linda Appelbaum, who was represented to such investigators as the Respondent's girlfriend (S.F. 123-129). The testimony reveals that the investigators did in fact go to Linda Appelbaum's home (S.F. 44-98, 106-110).

Surveillance of Respondent's friends or family, and discussion of his personal deportment, have nothing to do with this case. Such surveillance or discussion is nothing more than harassment by the Petitioners in an effort to force a settlement. The trial court did not abuse its discretion by temporarily enjoining such conduct; and the Court of Appeals did not err in affirming such order. In a proper case, a trial court may temporarily restrain

out-of-court statements in order to preserve a fair trial. See *In re: Halkin*, 598 F.2d 176 (D.C. Cir. 1979) and cases cited therein.

CONCLUSION

For these reasons, the petition for writ of certiorari should be dismissed; or, alternatively, denied.

Respectfully submitted,

MICHAEL T. POWELL
601 Jefferson, Suite 1060
Houston, Texas 77002
(713) 659-8770

Attorneys for Respondent

Of Counsel:

BRILL, BROOKS, POWELL & YOUNT

CERTIFICATE OF SERVICE

I, Michael T. Powell, hereby certify that, on the 12th day of April, 1983, the Respondent's Brief in Opposition was served on Edmund L. Cogburn of Dow, Cogburn & Friedman, attorney of record for Petitioners at 2300 Coastal Tower, Nine Greenway Plaza, Houston, Texas 77046, by mailing it to him, by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, postage prepaid.

MICHAEL T. POWELL

Office Supreme Court, U.S.
FILED
APR 27 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 82-1241

E. WAYNE PINCKARD, ET AL,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITIONERS RESPONSE TO "RESPONDENT'S BRIEF IN OPPOSITION"

EDMUND L. COGBURN
DOW, COGBURN & FRIEDMAN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

Attorneys for Petitioners

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

SUBJECT INDEX

	Page
RESPONDENT'S "REASONS FOR DENYING THE WRIT" ARE FRIVOLOUS	2
(a) The judgment sought to be reviewed is final for the purposes of this Court	2
(b) Regardless of whether or not the state courts did or did not "expressly" pass on our federal questions, the questions were in fact raised and the rulings disposed of them	3
(c) The Petition for Writ of Certiorari is timely, since Petitioners acted diligently to secure review as far as they could go in the state courts before turning to this Honorable Supreme Court of the United States	4
(d) Petitioners did not waive any rights by their failure to challenge a previous injunction	5
(e) Only by the most procrustean torture of meanings can Respondent even suggest that "pleadings, evidence and law support the subject order."	6
SUMMARY	8
CERTIFICATE OF SERVICE	9

LIST OF AUTHORITIES

CASES

	Page
American Railway Express Co. v. Levee, 263 U.S. 19 (1923)	4
Austin v. Keefe, 402 U.S. 415 (1971)	3
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	6
Nebraska Press Asso. v. Stuart, 423 U.S. 1327 (1975)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CAUSE NO. 82-1241

E. WAYNE PINCKARD, ET AL,
Petitioners

v.

KENNETH R. PINCKARD,
Respondent

PETITIONERS RESPONSE TO "RESPONDENT'S BRIEF IN OPPOSITION"

The Petitioners, E. Wayne Pinckard ("Wayne"), PBI houston, Inc., formerly Pinckard Brothers Interests, Inc. ("PBI"), W. Howard Smith, The Bradford Group, Inc. ("Bradford"), Gene Phillips ("Phillips") and Syntek Corporation ("Syntek"), respectfully request that this Court review the following as a response to "Respondent's Brief in Opposition".

RESPONDENT'S "REASONS FOR DENYING THE WRIT" ARE FRIVOLOUS

(a) The judgment sought to be reviewed is final for the purposes of this Court.

It seems clear that violations of fundamental First Amendment rights in the nature of prior restraint are subject to review by this Honorable Supreme Court of the United States even when they occur through pre-trial orders or temporary injunctions, regardless of whether or not such orders or injunctions are subject to ultimate dissolution upon final trial. An example of this may be found in *Nebraska Press Asso. v. Stuart*, 423 U.S. 1327 (1975), opinion by Blackmun, J., as Circuit Justice, granting reapplication for a stay of an order restricting pretrial coverage by the news media concerning alleged sexual assaults upon and murders of six members of a family. Justice Blackmun's opinion points out that the issue raised is "one that centers upon cherished First and Fourteenth Amendment values; that the challenged state-court order obviously imposes significant prior restraints on media reporting; that it therefore came to (him) 'bearing a heavy presumption against its constitutional validity . . .' ".

The opinion in *Nebraska Press* goes on to say:

> Where, however, a direct prior restraint is imposed upon the reporting of news by the media each passing day may constitute a separate and cognizable infringement of the First Amendment. . . . To this extent, any First Amendment infringement that occurs with each passing day is irreparable . . . in this sense, *delay itself is a final decision* . . .

> . . . Still, the likelihood of irreparable injury to First Amendment interests requires me to act . . .

In organization for a better *Austin v. Keefe*, 402 U.S. 415 (1971), this Honorable Supreme Court of the United States applied the same strict standards to a temporary injunction infringing First Amendment rights by restraining the distribution of pamphlets, leaflets or literature within a suburb. The opinion noted:

> Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity (citations omitted). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint . . .

In short, with First Amendment rights involved, the NLRB cases discussed by Respondent are irrelevant, to the point of frivolity. Because of the daily loss of First Amendment rights, the temporary injunction issued by the trial is, in fact, a "final" judgment for the purposes of the jurisdiction of this Court.

(b) Regardless of whether or not the state courts did or did not "expressly" pass on our federal questions, the questions were in fact raised and the rulings disposed of them.

Respondent seems to suggest to this Honorable Court that state courts or lower federal courts can, effectively, discourage this Court from entertaining jurisdiction over serious denials of constituitonal rights by simply failing to discuss or write on these questions when they are raised. It is certainly true, that the Court of Appeals in its three paragraph unpublished opinion, made no men-

tion of the federal questions. If lower courts can escape review by simply omitting the tough legal questions from thier opinions, then reversal will become rare indeed. Whether or not precedent has been established should not be the criteria for this Honorable Court, since, otherwise, the door will therefore be opened wide for the abuse of constitutional rights through the facile tactic of ignoring them. It is our assumption that this Honorable Court will treat this argument with the contempt which it deserves.

(c) The Petition for Writ of Certiorari is certainly timely, since Petitioners acted diligently to secure review as far as they could go in the state courts before turning to this Honorable Supreme Court of the United States.

Respondent cites *American Railway Express Co. v. Levee,* 263 U.S. 19 (1923), a case which holds *exactly the opposite* of the position for which it is cited.

In fact, *American Railway Express* is almost on "all fours" with our case. The suit was brought in a Louisiana court, appealed to the Court of Appeals unsuccessfully and then application was made to the Supreme Court of Louisiana for Writ of Certiorari, "refused for the reason that the judgment is correct". This is almost exactly the path followed in our case. The opinion of this Honorable Supreme Court of the United States in *American Railway Express* noted that a preliminary objection was "urged that the present Writ of Certiorari was addressed to the Court of Appeals, and not to the Supreme Court . . .".

The opinion pointed out that "when the jurisdiction was declined, the Court of Appeals was shown to be

the highest court of the state in which a decision could be had". On the other hand, this did not change the time limitations because it was appropriate to apply to the Supreme Court and was only when the Supreme Court refused to take jurisdiction did the appellate time limits begin running against the Petitioner with respect to the Writ of Certiorari to the Supreme Court of the United States. This is clearly set forth in the following language on page 20 of the opinion:

> . . . Of course, the limit of time for applying to this Court was from the date when the Writ of Certiorari was refused.

Surely, it is the height of frivolity to cite this case for a proposition diametrically opposed to the principle upon which it was decided.

(d) Petitioners did not waive any rights by their failure to challenge a previous injunction.

Respondent suggests that Petitioners waived their First Amendment rights by failing to object to an original injunction which, itself, likewise violated First Amendment rights of Petitioners. In fact, under the Rules of Civil Procedure of the State of Texas, Petitioners have every right to move to dissolve an original temporary injunction short of appeal which they determined to do. The Motion to Dissolve the Original Temporary Injunction was the pleading upon which a trial type hearing took place which resulted in the issuance of the order of which we complain. Contrary to the statement at page 4 of the Respondent's "Brief in Opposition", the Petitioners *did* "seek dissolution of the foregoing quoted portion" (involving prior restraint), since their application for dis-

solution sought dissolution of the injunction as a whole. (The whole, necessarily, includes its parts.)

Again, by the citation of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), Respondent has cited a case which holds to the contrary of the proposition for which it is cited. In *Butts* the opinion states:

> Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling . . .

(e) Only by the most procrustean torture of meanings can Respondent even suggest that "pleadings, evidence and law support the subject order."

Apparently, the Brief suggests that an Application to Enjoin Surveillance or Investigation is a sufficient pleading to support an order enjoining Petitioners from divulging information regarding the personal deportment of the Respondent. Such an argument, again, fails to rise above the level of frivolity.

There is no pleading regarding "personal deportment" in the Respondent's "First Supplemental Application for Temporary Injunction" and the personal deportment of Respondent has no demonstrated relationship to the "trash of Pinckard Development Corporation".

From an evidentiary point of view, the closest that Respondent can get to "personal deportment" is the fact that the investigators were "told to go to the home of Linda Applebaum, who was represented to such investigators as the Respondent's girlfriend", along with testi-

mony that the investigators did in fact go to her home. No where does the record reflect that any information was developed by going to Linda Applebaum's home and there is nothing in the record concerning the results of the investigation which reflects any information as to the "personal deportment" of the Respondent. At page 5 of the *Brief*, Respondent suggests that "surveillance of Respondent's friends or family and discussion of his personal deportment, have nothing to do with this case . . .". Whether they do or do not, there was no evidence concerning "discussion of his personal deportment" in the record, no evidence of what such "personal deportment" had consisted of, and no pleading in the record asking for an injunction against discussion of "personal deportment".

The record does not properly support an injunction against surveillance, since the record in no way reflects that there was any abuse of any legally protected right of Respondnt by the survillance in question. In fact, the surveillance did uncover information that was helpful to the Petitioners lawsuit. Regardless, discussion of personal deportment was not shown by the record or pleadings to be in any way related to the surveillance.

In fact, the trial court *did* abuse its discretion by temporarily enjoining the exercise of First Amendment rights without any justification shown by the record or shown by the *Brief* of Respondent. There was no showing that this order was necessary or even helpful in order to "preserve a fair trial". Comments about "harassment" in the Brief are pure conjecture, without any evidence to support them.

SUMMARY

The judgment complained of is a final one resulting in daily and continuing violations and restraints on First Amendment rights. The state courts did, in fact, pass on Federal Constitutional questions raised by Petitioners regardless of their discussion thereof. The Petition for Writ of Certiorari is timely, having been filed less than ninety days after the decision of the highest state court in which a decision could have been had, the Supreme Court of Texas, regardless of the fact that the Supreme Court of Texas in fact rejected such decision. There was no waiver of First Amendment rights which were diligently pursued. The pleadings, evidence and law furnished no support or excuse of any kind for the order of the trial court.

PREMISES CONSIDERED, THEREFORE, Petitioners pray for the Writ of Certiorari to be granted and the order of the trial court overturned as violative of First Amendment rights and for such other relief as may be found proper by this Honorable Court.

Respectfully submitted,

DOW, COGBURN & FRIEDMAN

Original Signed By
By: EDMUND L. COGBURN

EDMUND L. COGBURN
2300 Coastal Tower
Nine Greenway Plaza
Houston, Texas 77046
(713) 626-5870

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Edmund L. Cogburn, do hereby certify that a true and correct copy of this Reply to Respondent's Brief in Opposition was mailed to Michael T. Powell, Brill, Brooks, Powell & Yount, 601 Jefferson Street, Suite 1060, Houston, Texas 77002, attorney of record for Kenneth R. Pinckard, Appellee and Respondent in this cause.

Signed this the 26 day of April, 1983.

Original Signed By
EDMUND L. COGBURN

EDMUND L. COGBURN